Supreme Court, U.S.
FILED
DEC 29 1998
OFFICE OF THE CLERK

No. 98-405

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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1. Appellee argues (Motion to Affirm (Mot.) 9-14) that this case is moot because the next regularly scheduled election for Bossier Parish School Board will not be held until 2002, after the Board should have adopted a new redistricting plan following the 2000 census. The Board's current plan, however, will remain in effect and will govern future elections unless and until it is replaced by another lawful plan. Thus, if the Board holds a special election because of a vacancy, the current plan will be used. See La. Rev. Stat. Ann. § 18:602(2)(A) (1979) (special elections in case of vacancies). And should the Board fail to adopt a new election plan following the 2000 census in time for the 2002 elections, or fail to obtain preclearance for a new plan under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, then the current plan would also be used for the 2002 elections. See *City of Rome* v. *United States*, 446 U.S. 156, 182-183 (1980). This case is therefore similar to numerous cases in which the Court has held that, when a challenged election practice may be used in future

elections, the challenge remains a live controversy despite the holding of the election. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 784 & n.3 (1983); *Storer* v. *Brown*, 415 U.S. 724, 737 & n.8 (1974); *Rosario* v. *Rockefeller*, 410 U.S. 752, 755 (1973).

Moreover, the Attorney General and the private appellants retain a live interest in the outcome of this litigation. If the district court's judgment is reversed, then the Board will presumably move expeditiously to prepare a new plan for preclearance and to hold new elections under that plan if it is precleared. Should the Board fail to do so, then voters or the Attorney General might be entitled to an injunction under Section 5 requiring special elections under a valid plan (either one previously precleared or one fashioned by the federal courts). See *Berry* v. *Doles*, 438 U.S. 190 (1978); *Lopez* v. *Monterey County*, 519 U.S. 9, 18, 21 (1996). The district court's preclearance of the Board's 1992 plan also directly affects the Attorney General's preclearance review of future plans submitted by the Board, for if the lower court's judgment granting preclearance is not set aside, then the Attorney General will have to use the 1992 plan as the benchmark from which to measure retrogression for future redistricting submissions by the School Board. See 28 C.F.R. 51.54(b).[1]

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[1] Even if this case were moot, the appropriate action would not be for the Court to dismiss the appeal (as appellee requests, Mot. 30). Rather, the established practice when a case becomes moot on appeal is for this Court to vacate the lower court's judgment and to remand the case with instructions to dismiss the complaint, so that the lower court's judgment retains no further effect. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997); *Watkins* v. *Mabus*, 502 U.S. 954, 955 (1991); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The course of action suggested by appellee would create an incentive for jurisdictions covered by Section 5 to delay the process of obtaining preclearance. A jurisdiction could wait to file a preclearance action until its election plan was nearly due for reapportionment; then, if it obtained an erroneous declaratory judgment granting preclearance, the jurisdiction could argue that the government's appeal should be dismissed because the plan would not be used in future elections. Section 5, however, was intended to deprive covered jurisdictions of the advantages of delay and extended litigation. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966).

Neither *Watkins* v. *Mabus*, 502 U.S. 954 (1991), nor *Hall* v. *Beals*, 396 U.S. 45 (1969), supports appellee's contention that a challenge to a voting practice becomes moot once the election is held. In *Watkins*, this Court held that voters' Section 5 challenge to special absentee ballot procedures ordered by the district court for an election to the Mississippi legislature became moot once the election was held. See 502 U.S. at 954-955. In that case, however, the district court ordered the special ballot procedures as an interim remedy because the Attorney General had objected to the State's 1991 plan, and elections had to be held under the previously precleared 1982 plan after considerable delay; the court made clear that the absentee ballot procedures were to be used "[s]olely for the September 17[, 1991] primary election for the Mississippi Legislature." 91-434 J.S. App. 6. There was no reasonable likelihood that the absentee ballot procedures would be used again, since future elections, even if held under the 1982 plan, could be planned for in due course. In *Hall* v. *Beals*, the Court held that a challenge to a state statute imposing a durational-residency requirement for voting became moot when the state legislature repealed the challenged requirement, 396 U.S. at 48; in this case, by contrast, the Board's plan remains on the books.[2]

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[2] Appellee requests (Mot. 7-8) that the Court consider the results of Board elections held in 1996 and 1998 under the 1992 plan, in which African-Americans were elected to the Board. The Court

2. Appellee contends (Mot. 14-19) that the district court did not limit its inquiry to retrogressive intent, but rather properly found an absence of a nonretrogressive, yet nevertheless discriminatory, purpose to the Board's plan. That contention cannot withstand scrutiny. After summarily stating that the "record will not support a conclusion that extends beyond the presence or absence of retrogressive intent" (J.S. App. 3a), the court made clear that "[t]he question we will answer, accordingly, is whether the record disproves Bossier Parish's retrogressive intent in adopting the Jury plan." *Id.* at 4a. The district court never again addressed whether the evidence showed a nonretrogressive but discriminatory purpose.

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should decline to consider such evidence outside the record compiled in the district court, as it declined to do on the first appeal in this case. See *Reno* v. *Bossier Parish Sch. Bd.*, 517 U.S. 1154 (1996). The district court invited appellee to reopen the record on remand to address the 1996 election results, but appellee declined that invitation, J.S. App. 1a-2a n.1, and it is bound by that choice. Furthermore, although the *results* of those elections are subject to public notice, those bare results (including the race of the winners) cannot dispose of this case, for they do not provide sufficient information from which to draw a conclusion about the position of minority voters in Board elections. Without further information, the mere fact that black candidates have been elected to the Board, even from majority-white districts, does not permit a court (or the Attorney General) to conclude with assurance that the voting strength of the black community in Bossier Parish is no longer being diluted. Those bare results, for example, provide no information about voter turnout, unusual features about voting patterns in the districts from which those candidates were elected, or other circumstances that might have been peculiar to the 1996 and 1998 elections. Thus, as the district court concluded, "[w]ere we to consider the election results at all, we would need more information about them." *Ibid.*

The district court's discussion of the evidence under the framework of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), related only to retrogressive intent. When the court analyzed whether the 1992 plan bore more heavily on blacks than on whites, it examined only the "percentage shift in dilution" of blacks' voting strength in one particular district; that is, it considered only whether the plan significantly reduced the percentage of blacks in that district from the percentage under the previous plan, which could amount to retrogression. See J.S. App. 5a-6a.[3] The court also rejected other points raised by the intervenors to show that the Board enacted the plan with an unlawful purpose because, it stated, they would not "support a finding of retrogressive intent." *Id.* at 6a. The district court also precleared the 1992 plan despite finding that the Board's history included a "resistance to court-ordered desegregation" because that evidence was "not enough to rebut the School Board's *prima facie* showing that it did not intend retrogression." *Id.* at 7a. The district court acknowledged "[e]vidence in the record tending to establish that the board departed from its normal practices" in adopting the 1992 plan, but the court found that evidence not probative because it "is not evidence of retrogressive intent." *Ibid.* The court like-

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[3] Appellee suggests (Mot. 16-17) that, when the district court discussed the 1992 plan's dilutive impact, it must have been addressing discriminatory intent generally, and not just retrogressive intent, because it understood that this Court had used the term "dilutive impact" to refer to a discriminatory plan, rather than a retrogressive plan. That suggestion is plainly wrong, for on the prior appeal in this case, this Court made clear that evidence of a plan's dilutive impact is relevant to show retrogressive intent, and it reversed the lower court's earlier refusal to consider such evidence for that purpose. J.S. App. 45a-47a.

wise dismissed the evidence of the contemporaneous statements of Board members because the statements "do not establish retrogressive intent." *Id.* at 8a.

To the extent the district court may have examined the Board's discriminatory but nonretrogressive intent, that examination was plainly insufficient, as we have explained (J.S. 21-26). The district court did not address the evidence of such intent under the *Arlington Heights* framework, as Judge Kessler pointed out (J.S. App. 13a, 24a). Nor did the district court consider the point that the Board's discriminatory intent should preclude preclearance of the plan, even if the Board might have had some legitimate reason for enacting the plan, such as preserving precincts, as appellee suggests (Mot. 15-16). See *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 469 (1987) (reiterating that a covered jurisdiction has the burden to prove "the absence of discriminatory purpose" on its part).

The claimed motive of preserving precincts, moreover, is plainly insufficient to save the 1992 plan, for the record of events makes clear that it could not have motivated the Board to adopt that plan. There is no evidence that the Board was concerned about preserving precincts before the black community of the Parish began to request that a majority-black district be drawn. In fact, the Board anticipated the necessity of splitting precincts in order to adopt a plan that would best serve its legitimate objectives (including preserving the seats of incumbents, a goal that was sacrificed in the 1992 plan, see J.S. 23). In September 1991, after the Attorney General precleared the Police Jury plan, the Board rejected one member's suggestion that it adopt the Police Jury plan, and the Board's cartographer, Gary Joiner, told the Board that it would have to work with the Police Jury to alter precinct lines for its own

plan. J.S. App. 174a. The Board did not move to adopt the Police Jury plan for another year, but rather continued to explore other options. And although appellee notes (Mot. 4) that the Board was theoretically required by statute to adopt a plan before December 31, 1992, there is no evidence that this factor actually constrained the Board's consideration, and the district court made no finding to that effect. To the contrary, because the next regular Board elections were not scheduled until October 1994, the Board had ample time in which to adopt a plan, as its cartographer reminded the members. J.S. App. 172a-173a. The Board did not make the abrupt decision to switch course and adopt the Police Jury plan until September 1992, only two weeks after the NAACP presented a plan that demonstrated that majority-black districts could be created. *Id.* at 180a.

3. Finally, appellee argues (Mot. 19-28) that Section 5 requires the Attorney General and this Court to preclear voting changes enacted with a racially discriminatory intent (as long as those changes do not have a retrogressive effect). The plain language of Section 5, however, states that a covered jurisdiction is entitled to preclearance only if it shows a new voting practice "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. The language of Section 5 tracks the text of the Fifteenth Amendment itself, which prohibits purposeful racially discriminatory practices in voting, whether or not retrogressive. See *City of Mobile* v. *Bolden*, 446 U.S. 55, 61-65 (1980) (opinion of Stewart, J.). The statutory text also does not indicate that the prohibited purpose is limited to a retrogressive intent. This Court has held that the "effect" prong of Section 5 is limited to a determination

whether the new voting practice is retrogressive. J.S. App. 35a; see also *Beer* v. *United States*, 425 U.S. 130, 140 (1976). But the debate over the "effect" prong has involved how far *beyond* the Constitution itself Congress intended Section 5 to reach; there is no reason to doubt that Congress intended Section 5 to reach "*as far as* the Constitution itself." J.S. App. 57a (Breyer, J.).

Appellee's argument rests heavily on an effort to recharacterize this Court's decision in *Beer*, *supra* (see Mot. 24-28). Appellee acknowledges (Mot. 24-25) that, in *Beer*, this Court stated that a voting change can violate Section 5 if it "so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141.[4] It suggests, however, that at the time of the decision in *Beer*, this Court believed that adoption of a single-member districting plan would violate the Constitution *only* if the plan was enacted with a retrogressive purpose. *Beer* (which involved a single-member districting plan) did not remotely suggest, however, that

[4] Appellee also acknowledges (Mot. 24) that the definitive Senate Report accompanying the 1982 extension of Section 5 expressly approves that formulation of Section 5 in *Beer* (see J.S. 19), but it argues that this legislative history should be disregarded because the Court rejected reliance on the same Report on the prior appeal in this case (see J.S. App. 42a). The aspect of the Senate Report rejected by this Court on the prior appeal, however, involved a different statement in that Report, which suggested that a violation of Section 2 of the Voting Rights Act, by itself, was a ground for denying preclearance under Section 5; that statement in the Senate Report was *contrary* to the Court's earlier construction of Section 5 in *Beer*. The Court expressed doubt that, when Congress reenacted Section 5 without change, it would have silently disapproved the Court's decision in *Beer* without amending the statutory language. *Ibid.* This case involves Congress's *approval* of a different part of the Court's decision in *Beer*, stating that plans that violate the Constitution may not be precleared under Section 5; that congressional ratification deserves great weight.

constitutional vote-dilution claims involving single-member districts would require a different showing of purpose than the showing required for vote-dilution claims involving multi-member districts. Prior to *Beer*, this Court had held multi-member districts unconstitutional without any discussion of retrogression. See *White* v. *Regester*, 412 U.S. 755, 765-770 (1973). Whereas an intent to make the position of minorities worse would indeed be evidence of discriminatory intent, it is not required to show that unconstitutional purpose.

Appellee's efforts to avoid the effect of *City of Pleasant Grove*, *supra*, and *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd mem., 459 U.S. 1166 (1983), are also without merit. Appellee argues (see Mot. 28-29) that *City of Pleasant Grove* is consistent with a requirement of retrogressive intent, but as we have pointed out (J.S. 16), retrogression could not have been at issue there, because the City had no black voters; indeed, the Court specifically rejected the argument made there that, "since the annexations could not possibly have caused an impermissible effect on black voting, it makes no sense to say that [the City] had a discriminatory purpose." 479 U.S. at 471. Appellee appears to acknowledge (Mot. 28 n.11) that this Court rejected the position it is now advancing in *Busbee* v. *Smith*, but maintains that summary decision is entitled to little precedential value.[5] But while *this* Court treats

[5] Appellee also suggests (Mot. 28 n.11) that the lower-court decision in *Busbee* may have found retrogression. The appeal in that case, however, was presented to this Court on precisely the opposite assumption. See 82-857 J.S. 11-12 (citing district court findings of no retrogression). In any event, "[q]uestions which merely lurk in the record are not resolved" by summary affirmances, and "no resolution of them may be inferred." *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 183 (1979) (citations and internal quotation marks omitted).

its own summary decisions as less demanding of adherence than its fully articulated decisions, lower courts are not free to do the same, see *Mandel* v. *Bradley*, 432 U.S. 173 (1977), and so the district court's failure to adhere to *Busbee* warrants the Court's plenary consideration of this appeal.

4. The issue presented on this appeal is one of considerable importance that requires resolution. Beginning shortly after the release of census data in approximately April 2001, thousands of state and local jurisdictions covered by Section 5 will be adopting new redistricting plans and submitting them for preclearance to either the Department of Justice or the United States District Court for the District of Columbia. In every one of those submissions, the intent of the submitting jurisdiction will potentially be at issue. It is essential for both the submitting jurisdictions and the authorities making preclearance determinations to know whether the inquiry required by Section 5 reaches beyond retrogressive intent and is coextensive with the Constitution, and requires the jurisdictions to prove that they did not act with an intent to discriminate against racial minorities.

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For the foregoing reasons, and for those set forth in our jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1998